

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Closed Captioning and Video Description)
of Video Programming)
)
Implementation of Section 305 of the)
Telecommunications Act of 1996)
)
Video Programming Availability)

MM Docket No. 95-176

To: The Commission

PETITION FOR RECONSIDERATION
OF
ENCORE MEDIA GROUP LLC

J. Steven Beabout
Senior Vice President for Law and
Administration and General Counsel
Richard H. Waysdorf
Senior Counsel, Affiliate Relations

Encore Media Group LLC
Suite 600
5445 DTC Parkway
Englewood, CO 80111
Telephone: (303) 771-7700

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PETITION FOR RECONSIDERATION

Encore Media Group LLC ("EMG"),¹ pursuant to Section 1.429 of the Commission's Rules, hereby petitions the Commission to reconsider certain portions of its *Report and Order* in MM Docket No. 95-176, FCC 97-279, 62 Fed. Reg. 48487 (September 16, 1997) ("*Report and Order*"), and the rules adopted pursuant thereto. The *Report and Order* adopted rules implementing the requirements imposed by new Section 713 of the Communications Act, which was added by Section 305 of the Telecommunications Act of 1996 ("1996 Act"). Section 713 generally requires the Commission to adopt rules and implementation schedules for the closed captioning of video programming.

EMG broadly supports the general conclusions of the *Report and Order* and the rules adopted by the Commission in this proceeding. EMG believes that the Commission has struck an exceedingly fair balance between the real needs of persons with hearing disabilities and the costs to the video programming industry of providing such captioning. EMG supports the requirement that virtually all programming first exhibited after January 1, 1998, be broadcast with closed captions. In addition, EMG agrees that efforts must be undertaken to provide captioning of most programming first released prior to January 1, 1998.

EMG does, however, respectfully request the Commission to reconsider two discrete aspects of the new captioning rules. These aspects upon which EMG seeks reconsideration are as follows:

- 1) With respect to new programming first exhibited after January 1, 1998, EMG requests that the Commission reconsider its conclusion not to create an

¹ Encore Media Group LLC is the successor in interest to Encore Media Corporation, pursuant to an organizational reorganization without substantial change in ownership. Encore Media Corporation previously filed Comments in this proceeding on February 28, 1997, and Reply Comments on March 31, 1997. In addition, EMG filed an Ex Parte submission in this docket on July 28, 1997 ("EMG Ex Parte Filing").

exemption from the captioning requirements for children's educational programming.

- 2) With respect to older programming, EMG submits that the commission should have created an exception for programming first exhibited prior to January 1, 1970.

EMG notes that it formally raised the need for both of these proposed limited exemptions prior to the release of the *Report and Order* herein. The failure of the Commission to consider adequately the need for these two further exemptions should now be remedied by the creation of such exemptions in the final rules upon reconsideration.

I. Exemption for New Children's Educational Programming

With respect to instructional educational programming for children, EMG notes initially that its children's programming channel - WAM! America's Kidz Network - is a completely commercial-free youth-oriented educational/entertainment network which devotes a substantial portion of its schedule each day -- approximately half of each day -- to children's educational programming. This programming generally is produced on minimal budgets by institutions, governmentally-supported organizations, and nonprofit producers, and is presented by WAM! as a public service to its subscribers. The cost of captioning such programming in most cases would be prohibitive for the producing institutions, as the cost of closed captioning such programs would often actually exceed the license fees paid by EMG to the producers. EMG could not realistically pay for the closed captioning as that would increase the license fees by more than 100% in many cases.² Requiring producers or EMG to incur the cost of captioning will directly result in substantially less such programming being produced and aired. Therefore,

² EMG notes that in some instances, captioning has been provided for its educational programming where government grants have been obtained to defray the cost.

as EMG demonstrated in its Comments, such children's educational programming as a class should be exempt from the captioning requirements.

The *Report and Order* at Paragraph 106 noted EMG's recommendation that children's educational programming be exempt from the captioning requirements, but rather than adopt an appropriate exemption, the Commission determined, at Paragraphs 160-62, to lump this requested exemption into the generalized exemption based on revenues of the programming service which carries such programming, as provided in new Section 79.1 (d)(11) of the Rules. EMG submits, however, that this approach fails to satisfy the discrete and compelling need for an exemption for children's educational programming, and that the failure to create an appropriate exemption will directly result in less educational programming being aired, not only on WAM!, but on all other programming services which air such important, but commercially limited children's educational programming. If the costs of airing instructional programming are essentially doubled by imposition of captioning costs, programming networks that air such programming will be discouraged from carrying such public interest programming, choosing instead to carry programming that has more of a commercial base and which therefore would be more likely to have been captioned by its producer.

The effect of not exempting children's educational programming on EMG's WAM! channel is substantial, and the lack of such an exemption is not ameliorated by the general revenue-based exemption of Section 79.1(d)(11). Where the gross revenues of a channel are such that the revenue-based exemption does not impose its cap, the network would still be disinclined to continue airing the educational programming if such programming is not already captioned by its producer. As noted above, WAM! airs approximately twelve hours of instructional programming each day as a public service; in the year 2000, virtually all of it will

be “post-rule,” whereas most of the non-instructional programming on the channel will be “pre-rule.” Because the instructional programming is often produced in Australia or Canada, where captioning is virtually non-existent, WAM! itself would essentially be required to caption five hours of such programming each day. Based on the graduated phase-in schedule for new programming and assuming that the cost of captioning five hours a day of such programming would be at least \$2,500,³ the cost of such captioning per year for the years 2000 and 2001 would be approximately \$912,000 each year; in 2002 and 2003, the cost would be \$1,825,000 each year; in 2004 and 2005 the cost would be approximately \$2,737,000 each year; and in 2006 and beyond the cost would be approximately \$3,649,000 each year. With more realistic captioning costs than those assumed by the Commission (see note 3 above), these costs would be multiplied exponentially. Costs in the millions such as these would most certainly cause programming services to turn from children’s educational programming to other, more commercially viable programming that could support the investment in captioning costs. The Commission’s approach will thus result in less children’s educational programming being aired.

EMG submits that the focus for increasing the amount of captioning of children’s educational programs should not rest with the channels which air them (almost always as a public service without financial gain as in EMG’s case), but rather should be in seeking continued or increased governmental or foundation funding of captioning efforts for these programs. This is an instance where the marketplace unfortunately essentially fails, and where

³ The Commission has assumed a captioning cost of approximately \$500 per hour. EMG submits that this supposed cost is understated, and that the actual cost of captioning is at least double that amount. For the present purpose of demonstrating the impact of the failure to adopt an exemption for instructional programming, EMG will rely, for argument’s sake only, on the Commission’s understated figure.

the government or charitable foundations must move in to satisfy a societal need. Should captioning of educational programming merely be required of programmers, then unquestionably, less of such programming will be aired, because, as noted above, captioning easily and often costs more than the license fees, if any, that the programmers pay to obtain this programming. Where instructional programming aired on EMG's WAM! is captioned, it is almost always because a governmental or foundation grant has been obtained to defray the costs of the captioning. Otherwise, the economics of producing and airing noncommercial children's educational programming simply do not support its captioning. For these reasons, the Commission should exempt children's educational programming from the captioning requirements.

II. Exemption of Older Library Programming

EMG has also demonstrated that a further exemption for "pre-rule" programming should be adopted to insure that older films are not lost forever to American culture. Certain programming services that specialize in older films, like certain of EMG's Thematic Multiplex Channels (especially its Westerns, Mystery, and Love Stories Channels) as well as services from other programming providers, such as American Movie Classics (AMC) and Turner Classic Movies (TCM), consist of a substantial proportion of films first exhibited *theatrically* prior to 1970.⁴ EMG's concern is that the license fees drop off so dramatically for films first

⁴ While the definition of "pre-rule" programming in the rules appears to fix that classification on whether the programming was first broadcast on some form of *residential television* prior to January 1, 1998 (*see* Sections 79.1(a)(1), (5), and (6)), for purposes of EMG's proposed exemption for older programming, EMG would recommend relying on a different definition which focuses on when the programming was first exhibited anywhere, as was more clearly the implication of the statute (which defines new programming simply as programming "first exhibited" prior to the effective date of the new rules, without limiting that first exhibition

exhibited prior to 1970, that, with only a minimal return possible to the owner on the investment of \$1,000 to \$4,000 or more to caption such films, in most cases the owner will not choose to invest such money to create a captioned version. The result is that once the requirement of captioning 75% of pre-rule programming becomes effective in 2008, a substantial amount of the programming on which classic film channels rely will be essentially unavailable without the networks themselves, which will own none of these films but only a limited exhibition right, being required to undertake that 75% captioning obligation. With costs of the magnitude outlined above (at least \$2,737,000 per year per channel based upon the Commission's captioning cost estimate, which we believe to be very conservative, and likely less than half the actual cost), channels relying on older films will become prohibitively expensive to operate.

The result of this problem is not limited to a reduction in the number and diversity of programming *services*, but in a real loss to the culture of older, lesser known film titles. Evidence of such a phenomenon is already evident in the video cassette marketplace. Film owners have not automatically reissued all older films on video cassette; rather, only a small fraction of the more famous older titles have been released on video cassette. The cable networks such as Westerns, AMC, and TCM have been the only remaining home to these less prominent older film titles, and the lack of a captioning requirement for such older films will effectively end their lives on these cable networks as well. The result will be a severe cultural loss, not just the loss of a few cable channels and the resultant loss in diversity to viewers.

to residential television). For the purposes of this proposed exemption at least, the appropriate focus should be the programming's first exhibition anywhere, especially first theatrical exhibition. Especially in the case of feature films, it is difficult if not impossible to determine when such a film was first aired on *residential television*, as compared to when it was first exhibited *theatrically*, which is a standard fact published in all film reference sources.

This potential cultural loss was expressly recognized by Commissioner Chong in her Separate Statement accompanying her vote on the captioning rules. Commissioner Chong eloquently stated the problem as follows:

I was also very concerned about the impact our pre-rule programming requirements might have on program diversity. While encouraging us to “maximize” captioning of this older programming, Congress also appeared concerned that pre-rule programming not be relegated to the dusty archives due to the cost of captioning.⁵ As a practical matter, this older pre-rule programming is often relied upon by new cable networks, because such programs are relatively inexpensive and well-received by audiences. I am concerned that an overly stringent pre-rule programming captioning requirement may inadvertently have the effect of discouraging new cable networks whose business plan relied on this older programming. Although the captioning requirements we adopted for pre-rule programming provide more flexibility to programming providers than our rules for new programming, I remain concerned that our requirements may be too onerous. In particular, our requirement that 75% of pre-rule programming be captioned might be excessive. I believe that we ought to monitor the impact of this requirement carefully to ensure we are not overburdening pre-rule programming unduly.

Commissioner Chong’s expression of concern was right on the point, but the impact of this critical failure of the Commission’s decision should not be ignored now merely because its impact may not be felt for ten years. It is not sufficient to leave that issue for another day, to be revisited after “monitoring.” Indeed, prior to the tenth year when the pre-rule captioning requirement becomes effective, there is little to monitor; and once the rule become effective, it is already too late.

EMG in its earlier Comments and Reply Comments explained in great detail that the purchase of film library rights is a particularly long-term effort; EMG, as well as other operators of classic film networks such as AMC and TCM, are already engaged in negotiating limited exhibition licenses for films to be aired well beyond the 2008 effective date for the

⁵ Commissioner Chong cited H.R. Rep. No. 204, 104th Cong., 1st Sess., at 114 (1995).

required captioning of pre-rule programming. An exemption for programming first exhibited prior to 1970 will help preserve such films for American culture by preserving the broadest availability of such older programming to classic film networks. Without such an exemption, the range of available programming would be limited to that which the copyright owners thought could earn a sufficient return on the additional captioning investment to make that expenditure. As with creation of home video cassettes of such older films, the copyright owners would most likely pick and choose which films they thought would be worth their investment in captioning.

As EMG has demonstrated previously,⁶ a rule which exempts from the 75% pre-rule captioning requirements films and other programming first exhibited theatrically or otherwise prior to January 1, 1970, would help preserve this important cultural material which in general has a sharply reduced commercial value as compared to programming first exhibited after that date. EMG has previously submitted the chart appended hereto as Exhibit A, which shows the relative average license fee cost per film by decade. As is clearly visible, there is a dramatic drop-off in license fees from films first exhibited in the 1970s to films first exhibited in the 1960s, with the average license fee per title for films first exhibited in the 1960s substantially less than half the average fee per title for films first exhibited in the 1970s.

An exemption for programming first exhibited prior to 1970 would not substantially reduce the requirement of captioning most made for television series still being aired on most

⁶ EMG submitted the outline of its proposed exemption and supporting exhibits in its post-reply ex parte filing in this docket on July 28, 1997. EMG notes that under the proposal set forth in the Notice of Proposed Rule Making in this docket, the Commission proposed a 75% pre-rule captioning requirement without a time deadline for such obligation. The need for this particular exemption became more evident as the Commission moved toward an eight or ten year deadline for such an obligation.

programming networks and television stations, but rather only to older movies and series episodes that have extremely limited commercial licensing value. This requested exemption that would apply primarily to older films is appropriate to promote the airing of the greatest variety and range of such films, especially due to the manner in which older films and series episodes are purchased for use by programming networks. As noted above, a classic film network signs agreements for hundreds of film titles at a time, some of which will be aired, and some of which will have very limited utility. By comparison, with more recent television series, such as those currently in syndication, license agreements are signed for that series alone, and then the studio can have the financial incentive to go back and caption that series based on the revenues that will be generated from the license fees for that particular series. With a package of, for example, seven hundred classic but uncaptioned films, however, the studio is much less likely to be motivated to caption every film in that package based on the much more limited license fees it receives. If the thousands of films from which EMG now picks and chooses to program its Thematic Multiplex Channels are limited in the next contract cycles to those which the studios choose to expend the money to caption, the tremendous variety of films now aired on those networks will be reduced. Thus, the great bulk of classic films from the 1930s, 40s, and 50s will undoubtedly be relegated to the "dusty archives" just as both the House Report and Commissioner Chong feared.

III. Conclusion

EMG is actively pursuing the captioning of programming on all eleven of its programming networks, and for most of EMG's networks, closed captioning of both pre-rule and post-rule programming will proceed far more quickly and more fully than provided in the

Commission's new rules. However, there are two limited exemptions that were previously proposed by EMG and which we again ask to be considered by the Commission: (i) children's educational programming, and (ii) programming first exhibited before 1970. Both of these very narrow exemptions will insure that there will not be a substantial decrease in the amount and quality of these two important categories of programming. In both cases, the costs of captioning would be prohibitive to the networks' ability to continue to provide high quality programming to MVPDs and ultimately to subscribers at consumer-friendly rates. EMG respectfully asks the Commission to reconsider its rules and adopt the limited additional exemptions set forth above.

Respectfully submitted,

ENCORE MEDIA GROUP LLC

By Richard H. Waysdorf
J. Steven Beabout,
Senior Vice President for Law and
Administration and General Counsel
Richard H. Waysdorf,
Senior Counsel, Affiliate Relations

Encore Media Group LLC
5445 DTC Parkway
Englewood, CO 80111
Telephone: (303) 771-7700

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EXHIBIT A

AVERAGE COST PER FILM/ SERIES EPISODE BY DECADE

